

Application of Law to the Facts #2 – Claims 44 and 46-49

With respect to claims 44 and 46-49, the Examiner admits that Guyett does not specify that the game gathers data related to brand type, tag lines, product benefits, imagery, and communication language in particular.<sup>23</sup> The Examiner takes official notice, and the Appellants do not disagree, that it is old and well known for advertisements to frequently contain brand type, tag lines, product benefits, imagery, and communication language.<sup>24</sup> Consequently, the Examiner asserts that it would have been “obvious to one having ordinary skill in the art at the time of the invention was made to gather information related not only to advertisements in general, but also related to the above categories,” because “[t]his would allow the advertiser to understand more about how their product is doing in the marketplace.”<sup>25</sup> For much the same reasons as given above for claims 33 and 67, Appellants respectfully disagree.

Just because such categories of data may be present in particular forms of advertisements, it does not follow that there exists any disclosure in either Guyett or McIntyre to gather or process such data. While such a step might be advantageous *in hindsight*, the Examiner has not articulated or referenced any objective evidence that the advertiser in Guyett or McIntyre wished to understand (i.e., wanted feedback) how their brand type, tag lines, product benefits, imagery and communication language were being understood or recognized by the ad-viewers/game-players. As mentioned above with respect to claims 33 and 67, Guyett simply collects data to determine a prize amount to the game player, while McIntyre teaches away from directly contacting advertisers.

Consequently, for at least the above reasons, it is respectfully submitted that claims 44 and 46-49 are allowable in view of Guyett and McIntyre as these references fails to disclose each and every one of the limitations of these claims. Moreover, even if it is presumed solely for arguments sake that Guyett and McIntyre disclose each of the limitations of claims 44 and 46-49, McIntyre clearly teaches away from being combined with Guyett to read on Appellants claims by explicitly disclosing the objective of *not* directly contacting advertisers. By explicitly teaching away from contacting advertisers,

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<sup>23</sup> September 6, 2006 Office action, p. 8.

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<sup>25</sup> September 6, 2006 Office action, pp. 8-9.